

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

FRIDAY, THE 26TH OCTOBER 2007 / 4TH KARTHIKA 1929

CRL.A.No. 419 of 2003(C)

SC.214/2000 of ADDL.SESIONS COURT (ADHOC-II), KASARAGOD

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APPELLANT: ACCUSED:

KANTHAPPA POOJARY, S/O. DHUMA POOJARI,
CHERANKAL, KADAPURAM, KASARAGOD.

BY ADV. SRI.T.G.RAJENDRAN

RESPONDENTS: COMPLAINANT/STATE:

1. EXCISE INSEPCTOR,
EXCISE RANGE, KASARAGOD.
2. STATE, REP. BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY P.P.SRI.PUZHAKKARA MOHAMMED

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 26/10/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

K. THANKAPPAN, J.

CRL.A.NO.419 OF 2003

Dated this the 26th day of October, 2007.

JUDGMENT

The appellant faced trial for an offence punishable under Section 55(a) read with Section 55(1) of the Abkari Act on a complaint filed by the Excise Inspector, Kasaragod Excise range alleging that the appellant was found in possession of 33 liters of arrack on 1.10.1998 on the western side of the railway track at Beeranthbhal at Kasaragod District against the provisions of the Act and the Rules made thereunder. To prove the charge against the appellant, prosecution examined three witnesses and relied on Exts.P1 to P6. MOs 1 and 2 were also produced. While questioning the appellant under Section 313 of the Code, he denied all the incriminating circumstances proved against him by the prosecution and had stated further that the case was foisted against him by the Excise Officials on the instigation of one Krishnapoojari, who is residing near the place of the incident. On the side of the appellant, DW1 was also examined. No documentary evidence has been proved. The trial court relying on the evidence of Pws 1 and 3, the Preventive Officer and the Excise

Inspector, found the appellant guilty of the offence charged and he was convicted thereunder and sentenced to undergo R.I for one year and to pay a fine of Rs. One lakh with default sentence of payment of fine, to undergo R.I for a further period of three months. The judgment of the trial court is challenged in this appeal.

2. The counsel appearing for the appellant raised various grounds while challenging the judgment of the trial court. Firstly it is submitted that the evidence of Pws 1 and 3 ought not have been accepted by the trial court as PW2, the only independent witness examined in the case, turned hostile to the prosecution. Further, the counsel submits that PW3, the Excise Inspector, while detecting the offence had violated the provisions of the Abkari Act and the Excise Manual with regard to seizure of the contraband, taking of the sample, labeling and sealing of the same. Further, the counsel submits that as per the principles laid down by this Court in the judgments reported in **Surendran v. Excise Inspector** (2004 (1) KLT 404) and **Sudephan @ Aniyam v. State of Kerala** (2005 (2) KLD (CrI) 631), the finding of the trial court that the appellant committed an offence punishable under Section 55(a) of the Abkari

Act is not legally tenable. Lastly, the counsel submits that punishment awarded against the appellant is excessive and this Court may take a lenient view against the appellant, if the evidence of prosecution is accepted.

3. The trial court considered the evidence of Pws 1 and 3, out of whom PW3 was the Excise Inspector, who detected and investigated the crime against the appellant. The evidence of PW3 would show that on the day of the incident namely on 1.10.1998 when himself and other excise officials were on excise duty, they noted that the appellant was puring a liquid from a kannas with a green mug and when the excise party approached the appellant, they noted that the appellant was carrying MO1 kannas which contained about 33 liters of arrack and he was pouring arrack in MO2 mug near the railway line. Further evidence of this witness would show that the appellant was questioned and arrested at the spot and on preparing Ext.P1 seizure mahazar, MO1 kannas was seized and two sample bottles of arrack were taken for analysis and thereafter, the samples and the residue were properly sealed and labeled and got signed by two independent witnesses. Thereafter, a case was registered

against the appellant and as per Ext.P4 property list , the entire contraband article and the samples were produced before the court on 1.10.1998. Further evidence of this witness would show that, as per Ext.P6 Chemical Analysis Report, it was reported that the sample analysed contained 29.36% of ethyl alcohol by volume and the sample analysed was arrack. The evidence of this witness is also seen supported by PW1, the Preventive Officer, who accompanied PW3 along with the other Excise Officials. Though, these two witnesses were cross examined, their evidence has not been shaken and suggestions made to these witnesses, that the case was foisted against the appellant on the instigation of one Krishnapoojari and due to enmity kept by the Excise Officials towards the appellant, were denied. In the above circumstances, the trial court believed the evidence of Pws 1 and 3. PW2 though was examined to support the prosecution case, he turned hostile to the prosecution. However, this witness had admitted his signature in Ext.P1 mahazar, Ext.P2 arrest memo and other contemporary documents prepared by PW3. In the above circumstances, contention of the counsel appearing for the appellant that evidence of Pws 1 and 3 should not have been accepted by the court is not tenable. The trial court correctly appreciated the

evidence of these witnesses and the documentary evidence adduced by the prosecution. Further evidence of PW3 would show that all the material objects were produced before the court for verification and as per Ext.P4 property list, the residue and the samples taken for analysis were also produced before the court on the same day of the incident. If so, there is no violation of any of the provisions of the Abkari Act or the Excise Manual. Apart from this, evidence of PW3 would show that the sample and the residue were duly labeled and sealed though there is some confusion with regard to nature of the seal put by PW3 appears in the evidence of PW1. This is not enough to have any doubt regarding evidence of these witnesses. The next question to be considered is whether the trial court is justified in finding that the appellant had committed an offence under Section 55(a) read with Section 55(i) of the Abkari Act. As per the principles laid down by this Court in **Sudephan and Surendrans' cases** (cited supra), to attract an offence under Section 55(a) of the Abkari Act, the prosecution should prove that possession of contraband article is in connection with any import, transport or transit of the same. Though the prosecution has alleged that the appellant was found in possession of MO1 can with 33 liters of arrack, there is no

evidence to show that the said possession was in connection with any import, transport or transit of the same. The only allegation against the appellant by the prosecution was that he kept the same for sale. But, there is no evidence to show that the appellant had sold the prohibited liquor to anybody. In the above circumstances, finding of the trial court that the appellant had committed an offence under Section 55(a) read with Section 55(i) of the Abkari Act is not sustainable in law and hence, conviction and sentence awarded against the appellant under that section are hereby set aside. Accordingly, the appellant is acquitted of the offence punishable under Section 55 (a) read with Section 55(i) of the Abkari Act.

4. The next question to be considered is that as the trial court had accepted the evidence of Pws 1 and 3 to prove that the appellant was found in possession of 33 liters of arrack on 1.10.1998, what would be the offence be charged against the appellant? Arrack is a prohibited liquor in the State as per Section 8 of the Abkari Act. Arrack is also defined under Section 3(6A) of the Abkari Act, which reads as follows:

“Arrack” means any potable liquor other than Toddy, Beer, Spirits of Wine, Wine, Indian made spirit, foreign liquor and any medicinal preparation containing alcohol manufactured according to a formula prescribed in a pharmacopoeia approved by the Government of India or the Government of Kerala, or manufactured according to a formula approved by the Government of Kerala in respect of patent and proprietary preparations or approved as a bonafide medicinal preparation by the Expert Committee appointed under Section 68 A of the Act.

As per Section 8 of the Abkari Act, no person shall manufacture, import export, transport or transit [without permit transit] possess, store, distribute, bottle or sell arrack in any form. So, there is a clear prohibition of possession of arrack in any form and such possession, sale, distribution, bottling, storing, exporting, importing or even manufacturing of such arrack is punishable under Section 8(2) of the Act. Hence, the appellant is found guilty under Section 8(1) read with 8(2) of the Abkari Act. The next question to be considered is with regard to the punishment be awarded against the appellant. The trial court had found the appellant guilty under Section 55(a) of the Abkari Act and sentenced him to undergo R.I for one year and to pay a fine of Rs.One lakh. No special reason has been stated by the trial court for imposing such a penalty against the appellant. The State Government wants to

have complete prohibition of manufacturing, selling etc of arrack with a view to free the State from untoward incidents like liquor tragedy etc. In the above circumstances, if any person is found in possession, selling, manufacturing, bottling or storing or arrack shall be properly punished. However, as the incident took place about nine years back and the State had not filed any appeal for enhancement of the punishment, this Court is of the view that R.I for one year imposed by the trial court and the fine of Rs.One lakh will be the sufficient punishment for the appellant.

Accordingly, the appellant is found guilty under Section 8(1) read with Section 8 (2) of the Abkari Act and he is convicted thereunder and sentenced to undergo R.I for one year and a fine of Rs. One lakh with default sentence of payment of fine, to undergo R.I for a further period of three months. The appellant is entitled for the benefit of Section 428 of the Code of Criminal Procedure. Except the above alteration of conviction, in all other respects, the appeal stands dismissed. The bail bond executed by the appellant shall stand cancelled.

K. THANKAPPAN, JUDGE.

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K. THANKAPPAN, J.

CRL.A.NO.419 OF 2003

JUDGMENT

26th October, 2007.

